File 7/27/20 P. v. Lee CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EARL ARTHUR LEE, Defendant and Appellant.	B297565 (Los Angeles County Super. Ct. No.TA087633)

APPEAL from an order of the Superior Court of Los Angeles County and request to file an amicus brief, Robert J. Perry, Judge. The order is affirmed, the request to file an amicus brief is denied.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Earl A. Lee was convicted of two counts of first degree murder with three special circumstances, including that he "intentionally killed the victim while [he] was an active participant in a criminal street gang." (Pen. Code, § 190.2, subd. (a)(22).)[1] We affirmed his conviction and sentence on direct appeal. Appellant subsequently filed a petition for resentencing under section 1170.95. The trial court summarily denied the petition on two independent grounds: (1) appellant is not eligible for resentencing because he was the actual killer, acted with the intent to kill, and was a major participant in the crime who acted with a reckless indifference to human life, and (2) section 1170.95 and the legislation that led to its enactment, Senate Bill 1437 (S.B. 1437), are unconstitutional.

Appellant now contends that he established a prima facie case for relief that entitled him to counsel and a hearing, the trial court erred by relying on the Court of Appeal opinion resolving his direct appeal, and the trial court violated his rights to counsel and due process of law. He also contends that S.B. 1437 and section 1170.95 are constitutional. Respondent Attorney General agrees that S.B. 1437 and section 1170.95 are constitutional. Respondent further asserts, and we agree, that we need not reach the issue of constitutionality because appellant is ineligible for relief under section 1170.95 as a matter of law. We accordingly deny the application of the California District Attorneys Association to file an amicus curiae brief in support of the unconstitutionality of S.B. 1437 and section 1170.95 and affirm the order of the trial court.

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

I. Underlying Convictions

Our summary of the factual background is based upon our opinion affirming appellant's conviction, *People v. Lee* (July 2, 2010, B213692) [nonpub. opn.], which was relied upon by the trial court and is part of the record on appeal.

During appellant's joint trial with codefendants Calvin Dennis and Reyon Ingram, the prosecution presented the following evidence. On the evening of October 2, 2006, Najee Hassan accompanied his friend Derrick Kellum to pick up Kellum's sons, Octavious and Derrick Junior, and take them to Lawrence Bennett's house. Kellum called Dennis en route to tell Dennis he was going to Bennett's house. Hassan testified that Dennis met them when they arrived at Bennett's house. Dennis threw Kellum against a car and held a gun to him. Someone dressed in white joined Dennis, and the two beat Kellum and took his wallet. Dennis and his companion bumped chests and yelled, "Front Hood," the name of a local gang.

Derrick Junior, who was 11 years old at the time of trial, testified that Dennis and Ingram robbed his father in front of Bennett's house. After the robbery, while Derrick Junior was in the car with his father and Octavious, he heard his father speaking angrily with someone on a cell phone and agreeing to meet that person around the corner. Derrick Junior's father then stopped the car and got out. Derrick Junior heard gunshots and saw his father fall against the car. Derrick Junior saw Dennis standing next to where his father had been standing and observed Ingram shooting into the car. Derrick Junior managed to escape and run to a friend's house. Sheriff's deputies responding to the scene found Octavious lying dead outside the

driver's side of the car. Derrick Junior's father, Kellum, was lying dead in the backseat. Both had suffered fatal gunshot wounds. Law enforcement recovered eight expended cartridge casings and six bullets from the scene. Forensic specialists were able to determine that at least two, and possibly three, different guns were used.

Glenn Jefferson testified that Dennis, Ingram, and appellant came to his house on the night of the shooting; he knew them by their gang monikers of Bay-Rob, Soulja Boy, and Payso, respectively. Jefferson agreed to drive the trio wherever they wanted in his mother's black Lincoln Navigator. They left the house with Jefferson driving, Dennis in the front passenger seat, and Ingram and appellant in the backseat.

Dennis instructed Jefferson to drive down the street. As they approached the corner of 134th Street and Compton Avenue, Dennis, Ingram, and appellant jumped out of the Navigator. Jefferson heard a voice through the speaker of Dennis's cellphone saying, "I just want my wallet back." Jefferson then heard a couple of gunshots. Ingram ran back to the Navigator with a gun in his hand, opened the back door, and told Jefferson to wait for the others. Appellant and Dennis subsequently got into the vehicle, and Jefferson drove them back to Jefferson's house.

When the men returned to the house, Jefferson saw appellant with a wallet and Dennis counting money. Dennis said something to the effect of, "I know Soulja Boy, he did his thing." Jefferson admitted on the stand that he had previously withheld information from law enforcement and lied at two preliminary hearings. He stated that he did so because Dennis, Ingram, and appellant were at large and he feared for his family's safety if he told anyone about the incident. Jefferson also acknowledged that

he was arrested on unrelated charges, to which he pled guilty, while appellant's case was pending. Jefferson denied he was promised anything in exchange for his testimony.

Appellant's ex-wife, Rita Gilaspie, testified that she had been married to appellant 20 years earlier and kept in contact with him. Sometime around the date of the incident, he called her and said he had something important to tell her. When Gilaspie returned appellant's call an hour later, appellant told her that he had been involved in a double homicide with Bay-Rob, Soulja Boy, and another unnamed person and had "killed a kid." . Appellant told Gilaspie, "It was just supposed to be a robbery," but Bay-Rob shot the father and appellant shot the kid. He also told her, "he was trying to turn this Buick into a Benz"; appellant owned a Buick LeSabre at the time. Gilaspie heard voices in the background, and appellant said, "Bay-Rob, it's all right. This is my wife. It's okay, she's cool." Appellant told Gilaspie he was "on the run" and needed money. Gilaspie reported the call to law enforcement on October 16, 2006. Gilaspie acknowledged on the stand that she had a prior felony theft conviction and a prior misdemeanor conviction for welfare fraud. She further admitted that she was in financial trouble, and had received $5,000, relocation, and two months of rental assistance for her testimony. Gilaspie also acknowledged that she had argued with appellant in September 2006.

Gang experts testified that Dennis and appellant were members of the Front Hood Crips, a gang that engaged in selling narcotics and committing assaults, robberies, and murders. One of them stated that the robbery occurred in Front Hood's neighborhood and opined that both the robbery and murders were committed for the benefit of the gang.

After appellant and Dennis were arrested, they were placed in a jail cell where a recording device was hidden. The jury heard a tape of their conversation. Appellant said he told police that he did not know Dennis. Appellant expressed the view that the prosecution had no evidence. He said, "They can't put nobody [on] that know . . . ." Apparently referring to Derrick Junior, who was then 10 years old, Dennis said he believed that a witness had to be at least 13 to testify. Dennis further claimed that investigators did not know that appellant had been at the scene. According to him, the police believed that Ingram and Jefferson were present when Dennis shot the victim, took his wallet, and returned to the Navigator. Appellant asked, "How do somebody know that, though?" Dennis replied, "It had to be somebody that was there. This is before they even catch [Jefferson]." Appellant commented that there were only two witnesses to the shootings and neither would "be able to remember that clearly." He concluded, "Homey, that's how I know, homey, they don't got nothin'. They goin' on hearsay."

Appellant presented the testimony of two witnesses in his defense. Willie Brown testified that on the night of the incident, he heard gunshots and looked out the window of his home and saw a vehicle. He did not see anyone get into a car. When presented with a photographic lineup with his initials and a circled photograph of Jefferson on it, Brown denied seeing it before and telling police that Jefferson was the person he saw driving a black Navigator on the night of the murders. Brown acknowledged telling officers that he saw someone run to a black Navigator after the shooting and describing that person's clothing, but said he did not identify someone named Soulja Boy as that person. Brown claimed he did not tell police he

recognized the vehicle and did not know anyone in the courtroom. Brown admitted he had concerns for his family's safety, but denied he was in danger for testifying at the trial. Appellant also called a detective, who testified that he interviewed Brown on October 5, 2006, and Brown identified Jefferson as the driver of the Navigator at that time.

Appellant's codefendants, Ingram and Dennis, also presented evidence in their defenses. Ingram offered the testimony of Davon Gilbeau, who stated that Dennis got into an argument with Kellum at a liquor store on the night of the shooting. Gilbeau testified that Dennis displayed a gun in his waistband to Kellum and said he was going to shoot somebody that night. Ingram also took the stand himself. He testified that Jefferson drove him, Dennis, and appellant to the area of the shooting. Dennis and appellant got out of the Navigator, while Ingram and Jefferson remained inside. Ingram decided to step out, but heard gunshots as he was doing so. Appellant returned to the Navigator first, followed by Dennis. Jefferson then drove them away. During the drive, Ingram testified, appellant and Dennis discussed shooting the victims and warned Ingram not to say anything.

Dennis called a witness who testified that she was in the liquor store with Gilbeau, Dennis, and Kellum. She said that Dennis did not threaten Kellum.

The jury found appellant guilty of two counts of first degree murder (§ 187, subd. (a)), with special circumstance findings that he committed multiple murders, intentionally killed one of the victims by means of lying in wait, and intentionally killed the victims while he was an active participant in a criminal street gang (§ 190.2, subd. (a)(3), (15), (22)). The jury also found that a

principal intentionally discharged a firearm and proximately caused great bodily injury or death. (§ 12022.53, subd. (c)(1).) It further found that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) In a subsequent bench trial, the trial court found that appellant suffered two prior serious felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). The trial court denied appellant's motion for new trial and sentenced him to consecutive terms of life without the possibility of parole plus 25 years to life.

On direct appeal, appellant contended the trial court erred by "(1) denying his motion to dismiss on speedy trial grounds; (2) denying his *Marsden* motion; (3) denying his *Wheeler* motion; (4) admitting evidence of a prior gun possession; and (5) denying his motion for new trial." He also contended "(6) there is insufficient evidence to support the verdict; and (7) cumulative error requires reversal." We affirmed the judgment in full.

II. Section 1170.95 Proceedings

Effective January 1, 2019, S.B. 1437 "'amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).)" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) It also enacted Penal Code section 1170.95, permitting those who claimed they could not be convicted of murder under the new rules to petition for resentencing.

Appellant filed a section 1170.95 petition on January 4, 2019. This petition is not in the record. The trial court summarily denied the petition on March 11, 2019, without appointing counsel for appellant or holding a hearing. In its minute order, the trial court recited some of the facts from our previous opinion summarized above. It then explained: "As an actual killer in this case, Lee is not eligible for sentencing relief under Penal Code sections 1170.95 and 189(e)(1). He clearly acted with an intent to kill and was a major participant who acted with reckless indifference to human life, and is also barred from relief on those grounds. See Penal Code sections 189(e)(2) and (3)." The trial court continued, "As a second and independent ground for denying this petition for resentencing, the court finds SB 1437 and Penal Code §1170.95 are unconstitutional" for three reasons. First, S.B. 1437 "impermissibly amended two California [voter] initiatives, Proposition 7 and Proposition 115." Second, S.B. 1437 "violates Article I, §28(a)(6) and Article 29 of the California Constitution insofar as it purports to vacate final judgments in criminal cases." Third and finally, the trial court held that section 1170.95 "violates the separation of powers doctrine established by the California Constitution."

Appellant filed a second section 1170.95 petition on March 25, 2019. In that form petition, he checked boxes asserting that he was not the actual killer, "did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree," and "was not a major participant in the felony **or** I did not act with reckless indifference to human life during the course of the crime or felony." Appellant also checked a box requesting the appointment of counsel.

Appellant's second petition, which was filed in the incorrect courthouse, was transferred back to the trial judge who had presided over his criminal trial and ruled on his first petition. On April 12, 2019, that judge issued a minute order summarily denying appellant's second petition. The court stated: "The defendant's petition pursuant to Penal Code section 1170.95, received and filed on March 25, 2019 at the Compton Courthouse, is forwarded to this court. The defendant's first petition filed on January 4, 2019 was denied by this court on March 11, 2019. The court's ruling remains in full force and effect." The court did not hold a hearing or appoint counsel for appellant.

On April 12, 2019, appellant filed a handwritten letter requesting a transcript of the court's proceeding and a notice of appeal form. The trial court issued an order addressing the letter on April 23, 2019. It stated in pertinent part, "On March 11, 2019, the Court reviewed Lee's petition and issued a written denial finding that as an actual killer, Lee is ineligible for sentencing relief. There was no hearing, and the matter is closed." We deemed appellant's letter a notice of appeal.

DISCUSSION

Appellant contends that his petition stated a prima facie case for relief, thereby entitling him to counsel and a hearing, and that the trial court erred by looking beyond the petition to our previous opinion when evaluating his petition. Appellant further contends that trial documents beyond our prior opinion, namely the full reporter's transcript of his trial, establish that he was not the actual killer and "belie the trial court's determination" to that effect. He also argues that denial of his petition deprived him of his state and federal rights to counsel and due process of law. In a supplemental brief, he contends the

trial court also erred by finding S.B. 1437 and section 1170.95 unconstitutional. We reject the arguments raised in appellant's opening brief and accordingly need not reach his constitutional argument.[2]

Section 1170.95 allows a person convicted of felony murder or murder under the natural and probable consequences doctrine, to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial. . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a).)

Subdivision (b)(1) of section 1170.95 requires that the petition be filed with the court that sentenced the petitioner, and must include (a) a declaration by the petitioner that he or she is eligible for relief under the section; (b) the superior court case number and year of conviction; and (c) whether the petitioner requests appointment of counsel. Subdivision (b)(2) provides that the trial court may deny the petition without prejudice if any of

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[2]We note that the Attorney General agrees that the trial court erred in finding S.B. 1437 and section 1170.95 to be unconstitutional. Appellate courts have agreed, and the Supreme Court has denied review of those cases. (See *People v. Lamoureux* (2019) 42 Cal.App.5th 241, review denied Feb. 19, 2020, S259835; *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, review denied Feb. 19, 2020, S259700.)

the information required by subdivision (b)(1) is missing and cannot be readily ascertained by the court. (§ 1170.95, subd. (b)(2).)

Subdivision (c) provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

Many appellants challenging the summary denial of their section 1170.95 petitions contend that section 1170.95 does not allow a trial court to deny a section 1170.95 petition before the appointment of counsel (if requested) and briefing by the parties. As we have noted in our previous opinions, that contention has been rejected by numerous courts, and the issue is currently before our Supreme Court. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137-1140 (*Lewis*), rev. granted, S260598, March 18, 2020; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), rev. granted, S260410, March 18, 2020; *People v. Verdugo* (2020) 44 Cal.App.5th 320 (*Verdugo*), rev. granted, S260493, March 18, 2020.)

We find the analysis in *Verdugo* particularly persuasive. As that court explained, "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine

readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [S.B.] 1437 to the definition of murder in sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 323; see also *Lewis*, supra, 43 Cal.App.5th at pp. 1137-1140; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58.)

The *Verdugo* court noted that subdivision (b)(2) of section 1170.95 provides for an initial review to determine the facial sufficiency of the petition, while subdivision (c) "then prescribes two additional court reviews before an order to show cause may issue." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) The first of those is "made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Ibid.*) The court also observed that the first prima facie review of the petition under subdivision (c) of section 1170.95 "must be something more than simply determining whether the petition is facially sufficient; otherwise given subdivision (b)(2), this portion of subdivision (c) would be surplusage." (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328-329.)

The *Verdugo* court found that "subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent. As discussed, subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be

evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first prima facie determination required by subdivision (c). . . . Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding [S.B.] 1437's amendments to sections 188 and 189. . . . [¶] Because the court is only evaluating whether there is a prima facie showing the petitioner falls within the provisions of the statute, however, if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330.)

Our prior opinion resolving his direct appeal is part of appellant's record of conviction. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1136 & fn. 7.) The trial court appropriately relied on it when assessing whether appellant asserted a prima facie case for relief under section 1170.95. Appellant contends our descriptions of the facts were hearsay and could not properly support the trial court's finding that he was the actual killer. He also cites to the reporter's transcript of his trial—which is not in the appellate

record and may not have been before the trial court—to claim that he was not the actual killer. We need not resolve these contentions, as that was only one basis on which the trial court denied appellant's petition.

The trial court also found that appellant was ineligible for relief because he "clearly acted with an intent to kill." Our prior opinion—and the minute order documenting appellant's sentencing hearing—state that the jury found true a special circumstance allegation that appellant acted with the intent to kill. In making this finding, the jury necessarily found true that appellant participated in the crime and acted with the intent to kill the victims. This renders him ineligible for relief under section 1170.95 as a matter of law. (See *People v. Gomez* (2020) ____ Cal.Rptr.3d ____, 2020 WL 3960294, at pp. *8-*9.) The trial court accordingly did not err in summarily denying appellant's petition.

Appellant also contends the trial court's failure to appoint him counsel and conduct a hearing violated his state and federal due process rights. As discussed, however, the trial court's summary denial of appellant's petition complied with section 1170.95's procedures. Appellant has therefore suffered no due process violation. He likewise has not suffered a deprivation of his constitutional right to counsel, because he had no such right at this stage of a section 1170.95 proceeding. (Cf. *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156 [no right to jury trial in proceedings under SB 1437 because its retroactive relief is "an act of lenity that does not implicate defendants' Sixth Amendment rights"], citing *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064; *Pa v. Finley* (1987) 481 U.S. 551, 555 [prisoners have

no constitutional right to counsel "when mounting collateral attacks upon their convictions"].)

DISPOSITION

The order denying appellant's petition under section 1170.95 is affirmed. The application for permission to file an amicus curiae brief is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.